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In The

Supreme Court of the United States

MYRTLE FRANCES BROCKI,
Petitioner,
— vs. —
AMERICAN EXPRESS COMPANY,
an unincorporated joint stock association (defendant and third-party plaintiff below)
and
DEMERY'S, INC.,
a New Jersey corporation
(third-party defendant below),
Respondents.

October Term, 1960
No. 317

ON THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

AMERICAN EXPRESS COMPANY and DEMERY'S, INC., respondents herein, respectfully request that the Petition for Writ of Certiorari heretofore filed in this matter be denied.

QUESTION PRESENTED

Does an unincorporated joint stock association, organized under the laws of the State of New York and having members who are citizens of Michigan, have citizenship independent of that of its members for the purpose of federal jurisdiction based on diversity of citizenship?

STATEMENT OF THE CASE

This is an action originally brought in the United States District Court for the Eastern District of Michigan, Southern Division, by Petitioner, Myrtle Frances Brocki, a citizen of Michigan, against Respondent, American Express Company. All references to "Respondent" hereafter will denote American Express Company unless otherwise stated.

In her complaint, Petitioner alleged that defendant "* * * a corporation organized and existing under and by virtue of the laws of the State of New York * * *" and that for the purpose of giving this court jurisdiction, it is considered as a citizen of the State of New York" (2a). Respondent's Answer denied that Respondent is a corporation and stated in support of that denial "that defendant is an unincorporated joint stock association having its principal office in the City and State of New York, having stockholder members resident in the State of Michigan and in other states, and that it has no citizenship independent of that of its stockholder members" (6a).

In her Complaint Petitioner claimed federal jurisdiction based on diversity of citizenship and an amount in excess of $3,000.00 (2a). In its Answer Respondent denied the existence of diversity or the requisite jurisdictional amount (6a).

The Complaint and Answer were filed in 1953. No further action of significance to this Petition ensued until 1959, when Respondent filed its Motion to Dismiss for Lack of Jurisdiction. In its Motion, Respondent

The letter "a" preceded by a numeral refers to a page of the Record herein filed.

repeated the allegation of its Answer with respect to its status as an unincorporated joint stock association having members resident in Michigan, and denied the existence of diversity of citizenship between the Petitioner and the Respondent (10a). This Motion was supported by the Affidavit of Norman F. Page, Senior Vice President and Secretary of American Express Company (11a).

Petitioner answered this Motion, not denying the fact that Respondent is an unincorporated joint stock association having members in Michigan but claiming that despite such status, Respondent has citizenship in New York for the purpose of federal diversity jurisdiction (12a). In support of its answer to the Motion, Petitioner submitted the Certificate of the Michigan Corporation and Securities Commission describing American Express Company as "a New York corporation" (14a).

OPINION OF THE DISTRICT COURT

After hearing and argument on the Motion, the District Court filed a Memorandum Opinion, 172 F. Supp. 648, which states the case as follows (App. 19):*

> "Defendant American Express has filed a motion to dismiss for lack of jurisdiction. Plaintiff is a Michigan citizen. Defendant is an unincorporated joint stock association having more than 200 stockholder members living in Michigan at the time this suit was commenced, according to the affidavit of a Senior Vice President and Secretary of American Express."

The District Court noted that "Defendant relies on a

*The abbreviation "App" followed by a numeral refers to a page of the Appendix filed with the Petition.

long line of cases commencing with *Chapman v. Barney*, 129 U. S. 677 [illegible] (App. 20) and, after discussing the authorities relied upon by both parties, concluded (App. 20-21):

> "We believe there is no authority that would justify this Court in upsetting the well established rule [illegible] to the effect that the citizenship of its members determines the citizenship of an organization such as we have here for purposes of diversity jurisdiction. There being members who are Michigan citizens, and the plaintiff being a Michigan citizen, it follows that diversity jurisdiction is lacking."

On May 12, 1958, the District Court entered its Order (Supra) in accordance with its Memorandum Opinion dismissing the case, and Petitioner thereupon took an appeal to the United States Court of Appeals for the Sixth Circuit.

OPINION OF THE COURT OF APPEALS

In her brief and argument before the Court of Appeals, Petitioner sought initially to establish that a joint stock association organized and existing under the laws of the State of New York is regarded by the New York courts as a corporation under New York law. In its opinion (App. 22-27), the Court carefully examined applicable New York constitutional, statutory and case law (App. 23-25) and thereupon concluded (App. 24-25):

> "The New York courts have [sic] occasion to consider whether similar joint stock associations are, or are not, corporations. They have said they are not."

> "It follows that we must consider this [illegible]

> an unincorporated association, and hence it cannot be deemed a citizen, apart from its members, for the purpose of diversity jurisdiction. Chapman v. Barney, 129 U.S. 677; Great Southern Fireproof Hotel Co. v. Jones, 177 U.S. 449; Thomas v. Board of Trustees, 195 U.S. 207 * * *".

Petitioner then argued, as she had unsuccessfully argued before the District Court, that the case should be controlled by *Van Sant v. American Express Company*, 169 F. 2d 335 (C.A. 3rd, 1948), wherein diversity jurisdiction was assumed by the Third Circuit because the defendant could "be sued in its own name." The Court of Appeals rejected this argument, adopting the language of the trial court in its examination of the *Van Sant* case (App. 25-26):

> "We are convinced, however, that the Court's primary concern there had to do with capacity and that any observations as to jurisdiction are purely dicta and not determinative on any issue directly before that Court. The Court's attention there was directed toward a different question entirely, and the distinction between suability and citizenship in this constitutional sense may have been overlooked."

Petitioner also urged that the decision in *Puerto Rico v. Russell & Company*, 288 U.S. 476, 53 S. Ct. 447, 77 L. Ed. 903 (1932) invested Respondent with New York citizenship for purposes of diversity jurisdiction. But the Court of Appeals decided otherwise (App. 27):

> "It is not questioned that should a state endow a business organization, by whatever name called, with all the powers and characteristics of a corporation, without declaring it not to be one, it might be found to be a corporation for diversity

purposes. Such a case was Puerto Rico v. Russell & Company, 288 U.S. 476. That case dealt with a *sociedad* under the code of Puerto Rico, which carried the traditions of the civil law. But in deciding that case the court recognized the continued force of its decisions in Chapman v. Barney, 129 U.S. 677, and Great Southern Fireproof Hotel Co. v. Jones, 177 U.S. 449. Here the New York statutes and the New York decisions have long, as we have noted, indicated that state's policy not to make organizations like appellee association corporations of that state. This purpose cannot be ignored."

Finally, Petitioner sought to show that the State of Michigan had determined Respondent to be a New York corporation. The Court recognized that a foreign joint stock association, entering Michigan, is required by Michigan statute to procure a certificate of authority from the Michigan Corporation and Securities Commission, "in the same manner as if it were a foreign corporation" and noted that American Express Company had procured such a certificate (App. 26). The Court then examined Petitioner's contention based upon these statutory requirements (App. 26):

> "There is nothing unusual about provisions in state statutes that for the purposes of those acts joint stock associations, and other similar organizations, should be treated as corporations. *** But such provisions do not operate to make such foreign organizations corporations for the purpose of diversity jurisdiction. The Michigan court itself has repeatedly held that for purposes other than those specially named in this statute, and in its constitution, which is similar to the New York constitution previously referred to, the distinction between corporations and unincorporated organi-

zations such as this appellee is fully recognized. Michigan Trust Co. v. Herpolsheimer, 256 Mich. 589, 240 N.W. 6 (explaining Hemphill v. Orloff, supra); Attorney General v. Hill-Davis Co., 261 Mich. 89, 245 N.W. 579, 580."

On June 16, 1960, the United States Court of Appeals for the Sixth Circuit entered judgment for Respondent, affirming the judgment of the trial court.

ARGUMENT

Introduction

Contrary to the contentions of Petitioner (Petition, pages 2 and 3) there are no "special and important reasons" for review of the decision of the Court of Appeals. The question presented is not unsettled. In fact, the precise question involved here was resolved by this Court in 1889 in *Chapman v. Barney*, 129 U.S. 677, which ruling was followed by the Court below. Nor is there conflict between the decision appealed from and the decision of any other Court of Appeals. In the allegedly conflicting case of *Van Sant v. American Express Company*, 169 F. 2d 355 (C.C.A. 3rd, 1948), the Court of Appeals for the Third Circuit apparently overlooked the point at issue here, resting its decision on other grounds. The decision below rests on a solid and established foundation of controlling state and federal precedent, and in particular upon the opinion of this Court in *Chapman v. Barney, supra*. The Petition presents no basis for review by Writ of Certiorari.

The Question Presented Here Was Settled by this Court in Chapman v. Barney

Federal District Courts have original jurisdiction over controversies between citizens of different states, if the required amount is involved, by authority of the United States Constitution, Article III, Section 2,[3] and 28 U.S.C. 1332.[4] Although a corporation is deemed by statute a

[3] "SECTION 2. The Judicial Power shall extend to all Cases, in Law and Equity * * * between Citizens of different States * * *."

[4] "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between

(1) citizens of different States; * * *

(c) For the purposes of this section * * * a corporation shall be deemed a citizen of any State by which it has been incorporated and of the States where it has its principal place of business * * *."

citizen of the state of its incorporation for federal jurisdictional purposes, neither the statute nor the cases have ever excluded this concept to unincorporated associations. *Chapman v. Barney*, 129 U. S. 677, 9 S. Ct. 426, 32 L. Ed. 800 (1889); *Great Southern Fireproof Hotel Company v. Jones*, 177 U.S. 449, 20 S. Ct. 690, 44 L. Ed. 842 (1900); *Thomas v. Board of Trustees of Ohio State Univers'ty*, 195 U.S. 207, 25 S. Ct. 24, 49 L. Ed. 160 (1904). More specifically, the *Chapman* case holds that a joint stock association cannot be a citizen of a state, within the meaning of the statutes regulating jurisdiction of the federal courts, independent of the citizenship of its stockholder members. And although Congress has amended 28 U.S.C. 1332 several times since the *Chapman* case was decided in 1889, there has never been any Congressional action enlarging the scope of "corporation" in that statute so as to include joint stock associations.

The Petition in the instant case makes no mention of the *Chapman* decision. Respondent contends that *Chapman v. Barney* controls this case and obviates any conflict allegedly created between Circuits by the *Van Sant* decision.

The *Chapman* case was, in its original form, an action of assumpsit brought by the United States Express Company, a joint stock association organized under the laws of New York, against Chapman, a citizen of Illinois, in a United States District Court in Illinois. The Supreme Court raised the issue of jurisdiction for the first time on appeal; the issue had not been argued below or before the Court. Justice Lamar had the following to say on page 682 of the opinion:

> "On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff.

The allegation of the amended petition is, that the United States Express Company is a joint stock company organized under a law of the State of New York, and is a *citizen* of that State. *But the express company cannot be a citizen of New York within the meaning of the statutes regulating jurisdiction, unless it be a corporation.* The allegation that the company was *organized* under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is *not* a corporation, but a joint-stock company—that is, a mere partnership. And, although it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a Federal court.

"The company may have been organized under the laws of the State of New York, and may be doing business in that State, and yet all the members of it may not be citizens of that State. The record does not show the citizenship of Barney or of any of the members of the company.***

"For these reasons we are of the opinion that the record does not show a case of which the Circuit Court could take jurisdiction. The judgment of that court must therefore be reversed at the costs, in this court, of the defendant in error."

(Emphasis supplied)

Chapman v. Barney clearly sets forth the law governing the citizenship, for diversity purposes, of joint stock companies. It has been cited and approved in *Puerto Rico v. Russell & Company*, 288 U.S. 476, 53 S. Ct. 447, 77 L. Ed. 903 (1932). Likewise, *Chapman* has been approved by various United States Courts of Appeals in *Taylor v. Weir*, 171 F. 636 (C.C.A. 3rd, 1909); *Fred Macey Co., Ltd. v. Macey*, 135 F. 725 (C.C.A. 6th, 1905); *Rountree v.*

Adams Express Company, 165 F. 152 (C.A.A. 8th, 1908); *Swea v. First Church of Christ, Scientist*, 225 F. 2d 745 (C.A. 9th, 1955); and *Arbaugh v. State Automobile Insurance Association*, 264 F. 2d 260 (C.A. 10th, 1959).

The Decision Below Does Not Conflict with the Van Sant Case

In *Van Sant v. American Express Company, supra*, the jurisdictional question was first raised by defendant American Express Company when the case was before the Court of Appeals for the Third Circuit on rehearing, after a directed verdict for defendant had been reversed and remanded for a new trial. The Court did not appear to think well of this tardiness of assertion (at page 372):

> "By Rule 17 (b) of the Federal Rules of Civil Procedure[*], the law of Pennsylvania determines the capacity of American Express to sue or be sued. The Pennsylvania Rules of Civil Procedure provide that a joint stock company or association may be sued in its own name. American Express was here sued in its own name. It appeared and defended without objection and obtained a direction of verdict in the trial court. It never raised the question of its suability as an entity until, after rehearing the present appeal, we reversed the judgment and sent the case back for retrial.
>
> "Neither the facts nor the law indicate that such contention should now prevail. The point involved, in our view, is not under the rule of *Chapman v. Barney*[**] and similar cases as appellee insists but is simply as Professor Moore puts it

[*] Rule 17 (b) reads as follows:

"* * * In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States. * * *"

> in his book that 'a partnership or other unincorporated association may always sue or be sued in its common name if' the law of the state in which the district court is held 'recognizes such capacity'."

The Court then denied defendant's motion to dismiss.

The United States Court of Appeals for the Third Circuit in *Van Sant v. American Express Company, supra*, evidently recognized the continuing force of the *Chapman* case by attempting to distinguish it. In so doing, however, that Court failed to make the necessary distinction between suability as an entity and citizenship for purposes of federal diversity jurisdiction.

The failure of the *Van Sant* Court to distinguish diversity of citizenship and capacity to be sued in the common name of the company is explicitly criticized in *Swan v. First Church of Christ, Scientist, supra*, at p. 747:

> "This distinction between suability and citizenship in this constitutional sense may have been overlooked in *Van Sant v. American Express Co.*, 3 Cir., 169 F. 2d 355, 372."

It thus appears that rather than creating a conflict between circuits, the *Van Sant* decision stands as an isolated example of confusion of citizenship with capacity. It is fair to say that wherever the issue here presented has been recognized as a question of citizenship for purposes of diversity jurisdiction, the rule of *Chapman v. Barney* has been uniformly followed by the courts. The Court of Appeals in this case, when confronted with this issue, applied the *Chapman* rule to the facts, while the *Van Sant* court never met the issue in the first instance. The two cases do not conflict; they do not decide the same question. There is no conflict between Circuits which would justify review on writ of certiorari in this case.

Petitioner's Additional Argument Creates No Reason For Review by Writ of Certiorari in this Case

Petitioner's Argument, beginning on page 8 of the Petition, re-asserts three of her arguments to the Court below. Petitioner maintains (1) that Respondent is considered a corporation for all purposes by the New York Courts under New York law, (2) that Respondent has been determined to be a corporation by the State of Michigan as a condition of doing business within the State, and (3) that Respondent must be considered a corporation for purposes of diversity jurisdiction under the rule of *Puerto Rico v. Russell & Company, supra.* As a part of her third argument, Petitioner alleges that the decision of the Court of Appeals in the instant case is "in conflict" with the *Puerto Rico* decision, and as a part of her second argument, that the instant decision of the Sixth Circuit is "in conflict" with *Hemphill v. Orloff*, 238 Mich. 508, 213 N.W. 867 (1927), aff'd 277 U.S. 537, 48 S. Ct. 577, 72 L. Ed. 978 (1928).

The argument first listed above was given point by point consideration by the United States Court of Appeals for the Sixth Circuit, citing the New York General Associations Law, Article 1, Section 2,* found in McKinney's Consolidated Laws of New York, Annotated, Volume 18 A, and the cases of *People ex rel Winchester v. Coleman*, 133 N.Y. 279, 31 N.E. 96 (1892) and *Hibbs v. Brown*, 190 N.Y. 167, 82 N.E. 1108 (1907) to show that corporations and joint stock associations are not the same entities under New York law.

*"As used in this chapter: (1) the term 'joint stock association' includes every unincorporated joint stock association, company or enterprise having written articles of association and capital stock divided into shares, **but does not include a corporation** or a business trust." (Emphasis Supplied)

Petitioner's second argument, that the State of Michigan has determined Respondent to be a corporation, was rejected by the Court of Appeals, citing *Michigan Trust Company v. Herpolsheimer*, 256 Mich. 589, 240 N.W. 6 (1932), and *Attorney General v. Hill-Davis Company*, 264 Mich. 89, 245 N.W. 579 (1932). In the *Herpolsheimer* decision, the Michigan Supreme Court considered the status of a common law trust and held at pages 595-596:

> "* * * It is a voluntary association and recognized as such by the statutes which provide that it may sue and be sued.
>
> "It is contended, however, that this court has decided that a common-law trust constitutes a corporation within the meaning of the Constitution. *Hemphill v. Orloff*, 238 Mich. 508 (58 A.L.R. 507), stripped of surplus verbiage, holds a common law trust organized outside of Michigan amenable to the statute of Michigan regulating the right of foreign corporations attempting to do business in the State, which statute provides:
>
> "'The term "corporations" as used in this act shall be construed to include all associations, partnership associations and joint stock companies having any of the powers or privileges of corporations, not possessed by individuals or partnerships, under whatever term or designation they may be defined and known in the State where organized.' 2 Comp. Laws 1915, 9067 (see Act No. 327, Pub. Acts 1931, 597)."

The Court then discussed other cases including *Nedeau v. United Petroleum*, 251 Mich. 673, 232 N.W. 272 (1930), and concluded at page 597:

> "The language of this [Michigan] decision clearly indicates the distinction between a common law trust and a corporation, but upholds the legis-

> tive power to make the corporation law relative to the filing of the annual reports applicable to such common law trusts."

The same language may be applied with equal force to the status of defendant as a joint stock company doing business in Michigan. In *Attorney General v. Hill Dairy Company, supra*, the Court held that despite the provisions of the Michigan Constitution and of the statutes of the State of Michigan describing partnership associations as corporations, the character of such associations had not been changed. In support of its position that partnership associations were not corporations, the Court cited, *inter alia*, *First Mortgage Co., Ltd., v. Marcus, supra*, and *Great Southern Fireproof Hotel Co. v. Jones, supra*. With respect to the provisions of the Pennsylvania Constitution involved in the latter case, and similar to the above mentioned provisions of the Michigan Constitution, the Court stated (177 U.S. 456):

> "The only effect of that change is to place the joint stock companies or associations referred to under the restrictions imposed by that article upon corporations; *they still remain without all the attributes of corporations.*"

(Emphasis supplied.)

The Court in the *Hill Dairy* case concluded at page 93:

> "The legislature has power by its fiat to make a partnership association a corporation."

Finally, Petitioner argues that the instant case comes under the rule of *Puerto Rico v. Russell & Company, supra*. The Sixth Circuit properly recognized that the *Puerto Rico* case, decided under the rule of Puerto Rico v. Rosaly, 227 U.S. 270, found the defendant was not a corporation because it possessed all of the attributes of a corporation

under the law of its creation. The Court of Appeals then quotes the *Puerto Rico* opinion at 288 U.S. 480, 481:

> "The tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnership. *Chapman v. Barney, supra; Great Southern Fireproof Hotel Co. v. Jones, supra.* The tradition of the civil law, as expressed in the Code of Puerto Rico, is otherwise. Therefore, to call the *sociedad en comandita* a limited partnership in the common-law sense, as the respondents and others have done, is to invoke a false analogy."

To call Respondent a corporation under the law of New York is an equally false analogy, as has been shown by the Court of Appeals in its analysis of the applicable New York authorities.

None of these arguments supports a contention that the decision below conflicts with established precedent or presents an undecided question meriting review by this Court.

SUMMARY

Petitioner has failed to show special and important reasons for review of this case by the grant of a Writ of Certiorari. The alleged conflict between Circuits disappears in the light of the decision in *Chapman v. Barney, supra*, and similar cases decided by five United States Courts of Appeals. Petitioner has failed to show that Respondent is considered a corporation by the New York courts under New York law, that the State of Michigan has determined Respondent to be a corporation, or that the law creating and regulating Respondent brings it under the rule of the Puerto Rico case. Petitioner's con-

tentions here were carefully considered and correctly rejected by the Court below.

CONCLUSION

WHEREFORE, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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